No. 80-757

Office Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE,
RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI

Of Counsel:

MAURICE MOUND
REIN, MOUND & COTTON
125 Maiden Lane
New York, New York 10038

CHARLES PLATTO
JOSEPH W. MUCCIA
RUTH D. MACNAUGHTON
LISA SCHILIT
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

MELVYN J. FALIS
NEW YORK MERCANTILE EXCHANGE
4 World Trade Center
New York, New York 10048

WILLIAM E. HEGARTY
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi

October 1981

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Respondents and the CFTC do not address the issues presented	1
The language of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action	5
The statutory scheme of the Commodity Exchange Act does not permit the inference of a private cause of action	6
The legislative history of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action	10
The enactment in 1974 of the Commodity Futures Trading Commission Act does not permit the inference of a private cause of action under § 5(d), § 5a(8) or § 9(b)	11
The judicial implication of a private cause of action is impermissible	17
Conclusion	20

TABLE OF AUTHORITIES

Cases	PAGE
Aaron v. *SEC*, 446 U.S. 680 (1980)	16
Boys Markets, Inc. v. *Retail Clerks Local 770*, 398 U.S. 235 (1970)	15-16
California v. *Sierra Club*, 101 S.Ct. 1775 (1981)	5, 19
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	2
Commissioner v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955)	16
Complete Auto Transit, Inc. v. *Reis*, 101 S.Ct. 1836 (1981)	14, 17
Curran v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (Apr. 20, 1981) (No. 80-203)	4, 11, 15
Deaktor v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973)	14, 14n
Diamond v. *Chakrabarty*, 447 U.S. 303 (1980)	18
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	15
Girouard v. *United States*, 328 U.S. 61 (1946)	15
Jones v. *Liberty Glass Co.*, 332 U.S. 524 (1947)	16
Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, 101 S.Ct. 2615 (1981)	5n, 7, 10
National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974)	2, 3
NLRB v. *Plasterers' Local 79*, 404 U.S. 116 (1971)	16

PAGE

Northwest Airlines, Inc. v. *Transport Workers Union*, 101 S.Ct. 1571 (1981) 5, 6, 8, 17, 19

Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 10

Posadas v. *National City Bank*, 296 U.S. 497 (1936) 11n

Rivers v. *Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *pet. for cert. pending*, 49 U.S.L.W. 3712 (filed Mar. 24, 1981) (No. 80-1542) 13, 18

SEC v. *Sloan*, 436 U.S. 103 (1978) 12

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 8n

Southeastern Community College v. *Davis*, 442 U.S. 397 (1979) 10

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 101 S.Ct. 2061 (1981) 6, 8, 17, 18

Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) ..10, 16

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 15

TVA v. *Hill*, 437 U.S. 153 (1978) 12-13

United States v. *Powell*, 379 U.S. 48 (1964) 16

Universities Research Ass'n v. *Coutu*, 101 S.Ct. 1451 (1981) 5, 13-14

Wallace v. *Cutten*, 298 U.S. 229 (1936) 3

Congressional Documents

Bills:

H.R. 9178, 90th Cong., 1st Sess. (1967) 13

H.R. 13113, 93d Cong., 2d Sess. (1974) 14n

S. 2837, 93d Cong., 1st Sess. (1973) 13, 14n

PAGE

Congressional Record:

120 Cong. Rec. (1974)
30409 ..... 14n
30458-59 ..... 9n

Hearings:

Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Committee on Agriculture, 93d Cong., 1st Sess. (1973) 12n

Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. (1974) 10n, 16

Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture, 93d Cong., 2d Sess. (1974) 12n

House Reports:

H.R. Rep. No. 975, 93d Cong., 2d Sess. (1974) 7n-8n, 9n

Senate Reports:

S. Rep. No. 1131, 93d Cong., 2d Sess. (1974) 9n, 14n

S. Rep. No. 1194, 93d Cong., 2d Sess. (1974) (Conference Report) 9n

S. Rep. No. 850, 95th Cong., 2d Sess. (1978) 6-7

Statutory Provisions

PAGE

Commodity Exchange Act
§ 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979) 9
§ 3, 7 U.S.C. § 5 (1976) 2, 6
§ 4b, 7 U.S.C. § 6b (1976) 11, 14, 18
§ 5(d), 7 U.S.C. § 7(d) (1976) ..... *passim*
§ 5a(8), 7 U.S.C. § 7a(8) (1976) ..... *passim*
§ 6c, 7 U.S.C. § 13a-1 (1976) 3
§ 6d, 7 U.S.C. § 13a-2 (Supp. III 1979) 7
§ 9(b), 7 U.S.C. § 13(b) (Supp. III 1979) ..... *passim*
§ 14, 7 U.S.C. § 18 (1976 & Supp. III 1979) 7

Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389 ..... *passim*

Future Trading Act of 1921, ch. 86, 42 Stat. 187 3

Futures Trading Act of 1978, Pub.L.No. 95-405, 92 Stat. 865 ..... 3, 6, 11

Packers and Stockyards Act of 1921, ch. 64, 42 Stat. 159 2

Securities Exchange Act of 1934
§ 10(b), 15 U.S.C. § 78j(b) (1976) 4

No. 80-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE,
RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,

Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI

Respondents and the CFTC do not address the issues presented

The issue is whether there is a private cause of action for damages against a contract market and its officials under § 5(d), § 5a(8) or § 9(b) of the Commodity Exchange Act (the "CEA"). In their argument of the issue, respondents Leist, Smith and Incomco (collectively "Leist") and

amicus curiae Commodity Futures Trading Commission ("CFTC")

—ignore the language of the statutory provisions in issue (Ex. Br. 12-16). These provisions are not right-conferring or for the especial benefit of an expressly identified class. *Cannon* v. *University of Chicago,* 441 U.S. 677, 690 (1979). To the contrary, they are licensing, prescriptive and criminal statutes for the protection, as § 3 of the CEA makes clear, of the "public generally" and of buyers, sellers and handlers of commodities against price fluctuations caused by speculators such as Leist.

—ignore the comprehensive express remedies against contract markets provided by the CEA (Ex. Br. 17-18). Those remedies include suspension or revocation by the CFTC of contract market designation, the entry of cease and desist orders and the imposition by the CFTC of civil penalties of up to $100,000, criminal penalties and injunctions or writs of mandamus issued by the district courts upon application of the CFTC.

—ignore that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 458 (1974) ("*Amtrak*") (Ex. Br. 16). They thus ignore the Court's reiteration of this principle before the enactment of the Commodity Futures Trading Commission Act of 1974 (the "CFTCA") upon which they so heavily rely. The CFTC does not even cite *Amtrak.*

—ignore the legislative history of the enactment of § 5(d), § 5a(8) and § 9(b) in 1921, 1922, 1936 and 1968 (Ex. Br. 24-31). They thus ignore that the Packers and Stockyards Act of 1921 contained an express cause of action for damages, while the contemporaneously

enacted Future Trading Act of 1921 (the predecessor of the CEA) did not, that when the criminal proscription of manipulation in § 9(b) was enacted in 1936 Congress had before it *Wallace* v. *Cutten*, 298 U.S. 229, 237 (1936) which held, as did *Amtrak*, that " '[t]o supply omissions transcends the judicial function' " and that when paragraph (8) was added to § 5a in 1968 Congress did not enact a proposed express private damage remedy against contract markets.

—ignore that when in 1974 Congress enacted the CFTCA it did not enact a proposed express private damage remedy against contract markets, that it exempted contract markets from the reparations remedy it did enact and that it enacted the express provision of § 6c which authorizes the CFTC to seek injunctions or writs of mandamus against contract markets in the district courts (Ex. Br. 34-35, 17-19).

—and ignore that Congress exempted contract markets from the *parens patriae* damage remedy provided by the Futures Trading Act of 1978 (Ex. Br. 19-20).

Instead, although the enactment of the CFTCA was preceded by only one appellate decision "implying" a private damage remedy against a contract market, Leist and the CFTC argue that Congress as a whole was aware of such judicial "implication" of damage remedies under the CEA by reason of committee testimony, two references on the floor of one house and a reference in one report to a "growing body of opinion" (CFTC Br. 11-12). Building upon this supposed awareness on the part of Congress as a whole, they assert that "it must be presumed" (CFTC Br. 7) that Congress intended to continue such "implied" remedies. The argument is that, as the majority below put it (JA 128), Congress in 1974 "implicitly approved" the judicially-created remedy against contract markets.

A decision which is founded upon presumed implicit approval by Congress of one intermediate appellate

decision is—at least in the face of all the contrary evidence of statutory language and structure and legislative history—forbidden judicial lawmaking (Ex. Br. 32 n.*). This is underlined by the CFTC's reference to "the particular standards to be applied in determining liability, an issue that remains to be resolved by the lower federal courts" (CFTC Br. 24 n.25).

The various issues repeatedly presented to the Court in respect of the "implied" cause of action under § 10(b) of the Securities Exchange Act of 1934 provide a close analogy and a substantial reason why the Court should reverse the lawmaking indulged in by the majority below. The majority noted with approval "the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law analogy . . ." (JA 119 n.15). The Court of Appeals for the Sixth Circuit in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 236 (6th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (Apr. 20, 1981) (No. 80-203), also approved "the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5."

The courts, including this Court, are invited to legislate not only the existence of the remedy, but what measure of culpability is required, to whom the remedy is available, whether there shall be contribution among defendants and all the other questions inherent in the judicial implication of a remedy not provided for by Congress. The claim of respondent Incomco, which was interested in the cash commodity not in the allegedly manipulated futures contract, exemplifies the enormity of the claims which might be made and emphasizes the constitutional imperative that Congress, not the judiciary, determine the existence and elements of any remedy.

The language of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action

The Court recently said in *Universities Research Ass'n* v. *Coutu*, 101 S.Ct. 1451, 1461 (1981), that "[w]e turn first to the language of the Act itself," in *California* v. *Sierra Club*, 101 S.Ct. 1775, 1779 (1981), that "[i]n ascertaining [congressional] intent, the first consideration is the language of the Act," and in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 101 S.Ct. 1571, 1580 (1981), that "[i]n matters of statutory construction, it is appropriate to begin with the language of the statute itself." *

Despite the Court's repeated emphasis upon statutory language in determining congressional intent to create a private right of action, Leist and the CFTC, like the majority below, give it no weight at all. The Leist brief contains not a word about the language of the provisions asserted as the basis for an implied private remedy. The CFTC dismisses the subject in a footnote in which it concedes, "[t]o be sure, the explicit 'right creating' language that the Court also relied on in *Cannon* (see 441 U.S. at 690-693 n.13) is not present here" (CFTC Br. 25 n.26). It dismisses this crucial concession by quoting the wholly circular statement of the majority below that "the form in which [congressional] intent is expressed cannot be permitted to become an obstacle to its realization" (*ibid.*, quoting JA 160).

The language of § 5(d), § 5a(8) and § 9(b) evidences no intention by Congress to create a private damage remedy

---

* "Under the traditional common-law analysis . . . the primary question is whether the statute was enacted for the special benefit of a particular class of which the plaintiff is a member . . . . As we have held in the past, '[t]hat question is answered by looking to the language of the statute itself.' *Cannon* v. *University of Chicago*, 441 U.S. 677, 689." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 101 S.Ct. 2615, 2633 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part).

for their enforcement. The sections provide one criterion for the CFTC's designation of contract markets, require contract markets to enforce their rules which the CFTC has approved and make manipulation a criminal offense. They do so for the "public generally" and all those "engaged in the business of buying and selling commodity and the products and by-products thereof . . ." (CEA, § 3).*

The statutory scheme of the Commodity Exchange Act does not permit the inference of a private cause of action

That Congress did not intend to create a private remedy under § 5(d), § 5a(8) or § 9(b) also appears from the structure of the CEA. As the Court said in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 101 S.Ct. 2061, 2069 (1981), *quoting Northwest Airlines, Inc., supra*, 101 S.Ct. at 1584:

> "'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'"

Although Leist and the CFTC do not address the array of express remedies against contract markets provided by the CEA, its significance could hardly have been overlooked by them. When the *parens patriae* remedy was enacted in the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, the Senate Report described the "many customer protections and remedies" of the CEA, including the reparations procedure and the CFTC's "power to sue directly for injunctive relief and to invoke a full range of administrative remedies where appropriate

---

* That speculators form part of the market does not support the conclusion drawn by the majority below (JA 136) that they are among those for whose "especial benefit" the CEA, or, more accurately, the sections in issue were enacted.

to curb unlawful behavior;" no mention was made of any "implied" private cause of action. S. Rep. No. 850, 95th Cong., 2d Sess. 12-13 (1978).

As the Court said in *Middlesex County Sewerage Authority, supra,* 101 S.Ct. at 2623, after reviewing the express statutory remedies available against petitioners there:

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens. . . . As we stated in *Transamerica Mortgage Advisers, supra,* 'it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' 444 U.S., at 19, 100 S.Ct., at 247. See also *Touche Ross & Co.* v. *Redington, supra,* 442 U.S., at 571-574, 99 S.Ct., at 2486-2488. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

In contrast to the express administrative, injunctive and criminal remedies against contract markets, the two express monetary remedies available under the CEA, the reparations procedure of § 14 and the *parens patriae* action of § 6d, are, by their terms, inapplicable to contract markets (Ex. Br. 18-19).*

---

* The CFTC argues that Congress could not have intended to shield contract markets and their officials from monetary liability to private litigants suing under the CEA because it took "special care to preserve the threat of potentially greater treble damage liability for antitrust violations" (CFTC Br. 19-20). This argument seriously misreads the legislative history.

In fact, Congress "placed great reliance" on the propositions that " 'present law provides an adequate antitrust exemption for those activities of contract markets necessary to achieve valid objectives of the Commodity Exchange Act' " and that " '[u]nder

When the remedies available against contract markets and those from which contract markets are exempted are viewed together, there can be no question but that in the CEA "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1584, *quoted in Texas Industries, Inc., supra,* 101 S.Ct. at 2069.* The Court's analysis in *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1581-82, is equally applicable here:

> "The statutes make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal government in other circumstances. The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies. It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress." (Footnotes omitted)

Although Leist and the CFTC largely ignore the language and structure of the CEA provisions upon which

---

existing law, the conduct of exchanges . . . which is *mandated* by the Commodity Exchange Commission would be exempt from the antitrust laws' " and " 'activities of regulated exchanges approved, as distinguished from mandated, by regulatory agency, are also exempt from the antitrust laws if they are "necessary to make the . . . [regulatory act] work" and no more restrictive than necessary, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).' " H.R. Rep. No. 975, 93d Cong., 2d Sess. 27-28 (1974) ("House Report").

Assuming that contract markets are responsible under the antitrust laws for conduct such as was involved in *Silver,* it does not follow that failure by a contract market to prevent a manipulation is such conduct although the manipulation itself is by hypothesis a combination on the part of the manipulators that is forbidden by the Sherman Act.

* The CFTC acknowledges that it was created to administer a "comprehensive regulatory structure" (CFTC Br. 10).

they seek to base an implied private remedy, they attribute much significance to the language of the "savings clause" in § 2(a)(1), which provides that "[n]othing in this section [§ 201 of the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389] shall supersede or limit the jurisdiction conferred on courts of the United States or of any State." The savings clause follows clauses granting to the newly created CFTC exclusive jurisdiction over specified transactions while preserving the jurisdiction of the Securities and Exchange Commission ("SEC") and other federal and state regulatory authorities.

The legislative history of § 201 of the CFTCA reveals that Congress focused its attention on whether the exclusive jurisdiction of the new CFTC would preempt that of the SEC and the other federal and state agencies.* The savings clause was the response to the criticism, such as that of Chairman Rodino, that the exclusive jurisdiction given the CFTC would impact "federal-State relationships" because future contracts "are presently enforceable in State courts under recognized commercial law and contract principles;" the exclusive jurisdiction provision "could possibly be read as an attempt to oust even federal courts of jurisdiction" although "antitrust laws are to apply to commodity transactions;" and "if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising,

---

* *See* House Report at 28-29; S. Rep. No. 1131, 93d Cong., 2d Sess. 23 (1974) ("Senate Report"); S. Rep. No. 1194, 93d Cong., 2d Sess. 35-36 (1974) (Conference Report).

Leist relies (Leist Br. 32-33) heavily on a statement made by Senator Talmadge, 120 Cong. Rec. 30458-59 (1974), in an effort to show that the savings clause was designed to preserve a previously recognized private cause of action under the CEA. The Senator's remarks, however, do not allude to any such private right. Rather, they strongly suggest that the savings clause, in conjunction with § 412 of the CFTCA, was intended to guarantee that the passage of the CFTCA would not interfere with ongoing investigations by existing regulatory agencies such as the SEC and any judicial proceedings resulting therefrom.

thereby, serious questions of administrative and constitutional law." *

The effort by Leist and the CFTC to uncover evidence of congressional intent to create, or to preserve, a private cause of action in a savings clause is subject to the criticisms that the Court levelled against the similar argument made in *Middlesex County Sewerage Authority, supra*, 101 S.Ct. at 2624. The argument ignores the ambiguity of the clause "concerning the intent of Congress to 'preserve' [implied] remedies" under the very statute in which the clause appears and it "fail[s] to take account of the rest of the enforcement scheme expressly provided by Congress. . . ."

The legislative history of § 5(d), § 5a(8) and § 9(b) does not permit the inference of a private cause of action

The analysis of legislative history by Leist and the CFTC, like that of the majority below, is fundamentally flawed by their exclusive reliance on the enactment in 1974 of the CFTCA. The legislative history of the enactment of § 5(d), § 5a(8) and § 9(b) in 1921, 1922, 1936 and 1968 is ignored although, as the majority below stated (JA 111), the CFTCA "did not substantially alter any of the provisions which assertedly form the bases of an implied right of action" and although the determinative record is that of the enacting Congress. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574-75 n.16 (1979); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411-12 n.11 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

The CFTC's emphasis upon the enactment of the CFTCA rather than the earlier enactment of the particular sections

---

* *Commodity Futures Trading Commission Act: Hearings on S.2485, S.2578, S.2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. 260 (1974) ("Senate Hearings").

of the CEA which are in issue is doubly contradicted by the CFTC itself. To avoid the obvious inference to be drawn from the exclusion of contract markets from the *parens patriae* remedy added to the CEA by the Futures Trading Act of 1978, the CFTC comments "[e]ven if this subsequent legislative enactment has any relevance here . . ." (CFTC Br. 20 n.22). In its brief as *amicus curiae* in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra,* the CFTC relies upon the legislative history of the enactment in 1936 of § 4b of the CEA (CFTC *Curran* Br. 25-26).*

The enactment in 1974 of the Commodity Futures Trading Commission Act does not permit the inference of a private cause of action under § 5(d), § 5a(8) or § 9(b)

The CFTC argues (CFTC Br. 8, 10, 13) that Congress "was aware" and "plainly understood" before the enactment of the CFTCA in 1974 that the courts had "uniformly implied private rights of action" under the CEA (CFTC Br. 8). The CFTC principally relies (CFTC Br. 11-12)

---

* The CFTC also relies (CFTC Br. 15) on the Court's decision in *Posados* v. *National City Bank*, 296 U.S. 497 (1936), but that decision not only denies the significance the CFTC seeks to attach to the reprinting of the text of the CEA in the House and Senate Reports on the CFTCA (CFTC Br. 14 n.10) but also demonstrates the error in the CFTC's exclusive focus on the latter enactment:

> "The amendment is made in a well-approved form—a form which, indeed, many of the states compel by constitutional provision—namely, by repeating the language of the original section with the additions to which we have heretofore called attention. Unless the contrary plainly appear, the employment of such form of amendment is simply to serve the causes of convenience and certainty. . . . It follows that such parts of the original . . . as were copied into the amended section were not thereby repealed and immediately reenacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before." (*Id.* at 505-06)

on statements made by witnesses during committee hearings in 1973 and 1974 on the proposed legislation.*

That Congressional awareness may not be presumed on so insubstantial a basis was made clear in *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978):

> "We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which . . . is at odds with the language of the section in question and the pattern of the statute taken as a whole. . . ."

Similarly, in *TVA* v. *Hill*, 437 U.S. 153 (1978), the Court refused to presume that the statements found in

---

* Most of the excerpts from the hearings cited by Leist and the CFTC are not pertinent to the issue presented here because they refer to entirely different categories of claims, *i.e.*, those subject to the contract markets' own arbitration procedure or to the CFTC reparations procedure, neither of which can be invoked against contract markets and their officials. *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Committee on Agriculture*, 93d Cong., 1st Sess. 119 (1973) (statement of Reed Clark) (Leist Br. 27, CFTC Br. 11 n.5); *id.* at 197-98 (statements of Leo Melamed and Michael Weinberg, Jr.) (Leist Br. 27-28; CFTC Br. 11 n.5); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 52 (1974) (statement of William F. Brooks) (CFTC Br. 12); *id.* at 169 (statement of Frederick G. Uhlmann) (CFTC Br. 12); *id.* at 249 (statement of Charles W. Chapin) (Leist Br. 28, CFTC Br. 12); *id.* at 321 (statement of Sheldon L. Berens) (Leist Br. 28; CFTC Br. 12); Senate Hearings at 403, 415 (statement of Alvin W. Donahoo) (Leist Br. 29-30; CFTC Br. 12); *id.* at 524, 526 (statements of Frederick G. Uhlmann and Warren W. Lebeck) (Leist Br. 31; CFTC Br. 12).

appropriations committee reports expressed the view of Congress. The Court commented that "there is no indication that Congress as a whole was aware of TVA's position, although the Appropriations Committees apparently agreed with petitioner's views" (437 U.S. at 192).

Upon examination, moreover, the committee testimony relied upon by the CFTC does not bear out its assertions that "Congress frequently was informed that private rights of action had been held to exist under the Act" (CFTC Br. 11) and that it was "familiar with the precedents permitting private rights of action under the statutory provisions" here at issue (*id.* at 14 n.10). The Court of Appeals for the Fifth Circuit in *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *pet. for cert. pending*, 49 U.S.L.W. 3712 (filed Mar. 24, 1981) (No. 80-1542), drew a very different conclusion:

> "Stated charitably, we are less certain than are the plaintiffs and several of our sister courts that these few fleeting references—sometimes cryptic and all comparatively isolated among the hundreds of pages of testimony and debate that comprise the legislative history of the 1974 Act—are sufficient to establish that the *entire* Congress was even aware of and duly considered the existence of any previously inferred cause of action in its deliberations and vote upon the CFTCA." (634 F.2d at 786) (Emphasis in original; footnote and citations omitted)

The legislative history contains, however, striking evidence that Congress did not wish to create a private damage remedy against contract markets. It did not enact the private damage remedy proposed in § 505 of S. 2837, 93d Cong., 1st Sess. (1973) (Ex. Br. 34-35), just as it did not enact the private remedy proposed in § 32 of H.R. 9178, 90th Cong., 1st Sess. (1967), when it amended the CEA in 1968 (Ex. Br. 27-28). *Cf. Universities Research Ass'n,*

supra, 101 S.Ct. at 1465; *Complete Auto Transit, Inc.* v. *Reis*, 101 S.Ct. 1836, 1843-44 (1981).*

Both the CFTC and Leist gloss over the fact that prior to the enactment of the CFTCA in 1974 there was scant authority concerning an "implied" right of action against a contract market. The CFTC cites eleven decisions as "implying" a private right of action (CFTC Br. 8-9); Leist refers to these same decisions as fourteen (Leist Br. 20-21 n.7). Both the CFTC and Leist fail to mention that only two of these decisions, *Deaktor*** and one district court decision, "implied" a private remedy against a contract market (Ex. Br. 33 & n.*). In none of the other decisions was the defendant a contract market. Almost all the decisions cited by the CFTC (CFTC Br. 8) of which Congress was supposedly aware involved actions by a customer against his broker under § 4b of the CEA. Whether there

---

* The CFTC's contention that Congress rejected S. 2837 in its entirety "in favor of substantial amendment of the existing Act" (CFTC Br. 15 n.12) is inaccurate. Four key provisions of S. 2837 were incorporated substantially verbatim in the modified version of H.R. 13113, 93d Cong., 2d Sess. (1974), that was ultimately approved by the Senate committee and passed by the Senate. *Compare* S. 2837, §§ 203, 208(b)-(d), 211 and 303(a)(2) (reprinted in Senate Hearings at 79 *et seq.*) *with* H.R. 13113 (as amended), §§ 216, 315, 314 and 316 (reprinted in 120 Cong. Rec. 30409 *et seq.* (1974)). *See* Brief *Amici Curiae* on Behalf of Ten United States Commodity Exchanges at 21-22. Indeed, §§ 203, 211 and 208(b)-(d) of S. 2837 were enacted with only minor changes as §§ 216, 414 and 415 of the CFTCA, 7 U.S.C. §§ 12*e*, 20 and 6g(2)-(6). Because "the differences between the provisions of the various Senate bills, and the House bills" were considered (Senate Report at 20) and selected provisions of S. 2837 were retained by Congress, the deletion of § 505(a) cannot be dismissed as insignificant.

** *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.). *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). The only issue reached by this Court in *Deaktor* was that of primary jurisdiction. This Court did not reach the issue of whether the Seventh Circuit had correctly implied a private cause of action against a contract market.

is such a cause of action is the issue in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra*—an issue closely analogous to that decided in the negative in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). The context of the CFTCA did not contain anything analogous to the "'long-established and familiar principl[e]' of maritime law" that was at issue in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979), upon which the CFTC relies (CFTC Br. 13).

Leist and the CFTC further err in equating supposed congressional awareness with intent to approve a private cause of action for damages. In a line of decisions refusing to apply the "reenactment canon" relied upon by the majority below (JA 144), this Court has been extremely reluctant to presume legislative endorsement of judicial opinions from silence without some affirmative expression of congressional approval. In *Girouard* v. *United States*, 328 U.S. 61 (1946), the Court refused to infer that a statutory reenactment evidenced approval of three earlier decisions which the Court determined had been wrongly decided:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. . . . The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rules of those cases." (328 U.S. at 69-70)

Similarly, in *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235, 241-42 (1970), the Court declined to find that Congress had approved an earlier decision of the Court where the pertinent legislative history lacked "any persuasive circumstances evidencing a clear design"

to approve the decision. *See also Aaron* v. *SEC*, 446 U.S. 680, 700 n.18 (1980); *NLRB* v. *Plasterers' Local 79*, 404 U.S. 116, 129-30 (1971); *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).

As the majority below concluded (JA 127), the CFTC contends that "this case does not involve the question whether Congress intended *to create* a private right of action" but rather "whether Congress intended *to abolish* a previously recognized private remedy" (CFTC Br. 13, emphasis in original). This formulation—this shift in the burden of inquiry—is not analysis of congressional intent, but rather judicial legislation under the guise of deference to congressional intent. This formulation turns on its head the rule emphasized in the Court's recent decisions, which requires an affirmative showing of congressional intent to create a private remedy. In *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 571, the Court rejected the argument of SIPC "that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one" and concluded that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best."

Finally, even in 1974, Congress had not forgotten the distinction between the functions of the legislature and of the judiciary. Chairman Rodino urged Congress to clarify certain ambiguities in § 201 of the CFTCA regarding the continued operation of the antitrust laws *vis-a-vis* contract markets because:

> "As late as April 24, 1974, the Supreme Court reiterated, 'Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' *Kahn* v. *Shevin*, No. 773-78 (U.S. April 24, 1974)." (Senate Hearings at 259)

Congress responded by enacting § 412 and the savings clause in § 201 of the CFTCA. Congress was aware that it could not delegate its lawmaking powers to the courts through silence. In short, the jurisprudence of 1974 was not so different from that of today that Congress might expect a private cause of action under the CEA to float on nothing more substantial than the context surrounding the enactment of the CFTCA.

The judicial implication of a private cause of action is impermissible

Leist argues (Leist Br. 18) that a damage remedy under the CEA is necessary because "the only true deterrent to large manipulators, the only disagreeable, unglamorous penalty which forces exchange and brokerage house personnel to staff and listen to their compliance departments, is the certitude of large damage suits from every investor harmed by their enlistment in, or feigned ignorance of, the manipulation." As the Court noted in *Complete Auto Transit, Inc.* v. *Reis, supra,* 101 S.Ct. at 1845 n.18, a proposition such as this "is questionable on its own terms, overlooks an array of potential remedies that are available . . . apart from a damages remedy . . . and in any event was rejected by Congress."

In *Northwest Airlines, Inc., supra,* 101 S.Ct. at 1583, and again in *Texas Industries, Inc., supra,* 101 S.Ct. at 2070, the Court observed that a distinction must be drawn between judicial interpretation and judicial legislation:

> "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has not decided to adopt."

This fundamental difference was appreciated by the Court of Appeals for the Fifth Circuit, which, in *Rivers* v. *Rosenthal & Co., supra,* refused to infer a private right of action under § 4b of the CEA:

> "Th[e] conclusive reliance upon congressional intent in the evaluation of claims of implied rights of action is not simply an expedient tool or canon of construction, but is rooted in the limitations of the functional role allotted the judiciary . . . . Although we may breathe practical life into them, the federal judiciary —endowed with no legislative or policy making authority—has no power to 'imply' or otherwise to create private causes of action supplementary to express statutory schemes. Rather, we may only recognize or infer rights of action affirmatively created by the Legislative Branch. . . ." (634 F.2d at 781-82 n.11) (Citations omitted)

As the Court said in *Diamond* v. *Chakrabarty,* 447 U.S. 303, 317 (1980) (*quoted in Texas Industries, Inc., supra,* 101 S.Ct. at 2070):

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of Government, the Congress and the Executive, and not to the courts."

Such considerations as are advanced by Leist here

> "are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy

> considerations. . . . 'The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.' *United States* v. *Gilman*, 347 U.S. 507, 511-513, 74 S.Ct. 695, 697-698, 98 L.Ed. 898." *Northwest Airlines, Inc., supra*, 101 S.Ct. at 1584 n.41.

Again, in *California* v. *Sierra Club, supra*, 101 S.Ct. at 1781, the Court said:

> "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

The frequency with which this Court has been asked in recent Terms to address "the recurring question of implied causes of action," *California* v. *Sierra Club, supra*, 101 S.Ct. at 1779, indicates that the dockets of the federal courts at all levels will continue to be clogged by "implied" private right of action cases unless the reluctance of the trial and appellate courts to give up the "implication" of private causes of action is overcome.

That reluctance is grounded in the mistaken, albeit sympathetic, belief that the federal courts must provide a forum and a remedy, although Congress has provided none, for every private grievance that has some relationship to federal legislation or regulation. If the search for congressional intent concerning the creation of private remedies is permitted to go beyond its expression in positive enactment and if such intent may supposedly be found in congressional silence, as has happened here, this Court's decisions will have changed nothing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM E. HEGARTY
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Petitioners
New York Mercantile Exchange,
Richard B. Levine, Howard
Gabler and Alfred Pennisi

Of Counsel:

MAURICE MOUND
REIN, MOUND & COTTON
125 Maiden Lane
New York, New York 10038

CHARLES PLATTO
JOSEPH W. MUCCIA
RUTH D. MACNAUGHTON
LISA SCHILIT
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

MELVYN J. FALIS
New York Mercantile Exchange
4 World Trade Center
New York, New York 10048

October 1981